Clark United Corporation *and* Sheet Metal Workers International Association, AFL–CIO, CLC, Local Union No. 68. Cases 16–CA–17147 and 16–CA–17284

October 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

Pursuant to charges filed on January 17 and March 25, 1995, and an amended charge filed on April 4, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint on August 25, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by making certain unilateral changes following the Union's election in Case 16–RC–9745. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the consolidated complaint.

On September 18, 1995, the General Counsel filed a Motion for Summary Judgment. On September 19, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits that it made the alleged unilateral changes following the election without providing the Union prior notice or an opportunity to bargain, but contends that the election was improperly conducted and that the Union's subsequent certification was therefore improper.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Dallas, Texas, has been engaged in the business of manufacturing attic ventilation fans. During the 12-month period preceding issuance of the consolidated complaint, the Respondent, in conducting its business operations, purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All production and maintenance employees of the Employer located at its 3000 West Commerce Street, Dallas, Texas facility only.
>
> EXCLUDED: All other employees, including office clerical employees, supervisors, including assistant supervisors, and guards as defined in the Act.

On November 18, 1994, a representation election was conducted among the employees in the unit and, on June 6, 1995, the Union was certified as the exclusive collective-bargaining representative of the unit. The Union continues to be the exclusive representative of the unit employees under Section 9(a) of the Act.

On about January 6, 1995, the Respondent changed the wages of its unit employees. In addition, in January 1995, the Respondent unilaterally commenced using employees from a temporary service to perform bargaining unit work. These subjects are mandatory subjects of collective bargaining.[1] Nevertheless, the Re-

[1] Although the Respondent's answer (par. 11) denies the allegation that these subjects are mandatory subjects of collective bargaining, it appears to do so solely on the basis of the Respondent's contention that the Union's certification as the exclusive bargaining representative was improper. Thus, in par. 12 of its answer, the Respondent admits that it engaged in the alleged unilateral conduct without giving the Union prior notice and an opportunity to bargain ''because the representation election was not properly conducted and the Union was not properly certified as the exclusive bargaining agent of the Unit and, therefore, the Respondent had no obligation to notify the Union or afford the Union an opportunity to bargain with Respondent.'' Further, the Respondent has not filed a response to the Notice to Show Cause, and thus has not disputed the General Counsel's contention in the Motion for Summary Judgment that there are no genuine issues of material fact warranting a hearing. Accordingly, we find that the Respondent's denial in its answer raises no issues warranting a hearing.

spondent engaged in the foregoing conduct without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the changes and their effects. We find that by doing so the Respondent violated Section 8(a)(5) and (1) of the Act, as alleged. See *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

CONCLUSIONS OF LAW

By unilaterally changing the wages of its employees and unilaterally commencing the use of employees from a temporary service to perform bargaining unit work without providing the Union prior notice or an opportunity to bargain with respect to the changes and their effects, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union concerning the wages of unit employees and the use of employees from a temporary service to perform unit work, and, if an understanding is reached, to embody the understanding in a signed agreement.[2] We shall further order the Respondent to make the unit employees whole for any losses incurred as a result of its unlawful unilateral changes. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Clark United Corporation, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Sheet Metal Workers International Association, AFL–CIO, CLC, Local Union No. 68 as the exclusive bargaining representative of the employees in the following appropriate bargaining unit, by unilaterally changing the wages of unit employees and unilaterally commencing the use of employees from a temporary service to perform bargaining unit work without providing the Union prior notice or an opportunity to bargain with respect to the changes and their effects:

> INCLUDED: All production and maintenance employees of the Employer located at its 3000 West Commerce Street, Dallas, Texas facility only.
>
> EXCLUDED: All other employees, including office clerical employees, supervisors, including assistant supervisors, and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union regarding the wages of unit employees and the use of employees from a temporary service to perform bargaining unit work and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make the unit employees whole for any losses incurred as a result of its unlawful unilateral changes, with interest, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Dallas, Texas, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] In a prior unfair labor practice proceeding involving the Respondent (Case 16–CA–17449) we found that the Respondent had violated Sec. 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's June 6, 1995 certification, and ordered the Respondent to bargain with the Union on request. 318 NLRB No. 35 (Aug. 15, 1995) (not reported in Board volumes). The Board generally declines to issue a second bargaining order where the first order is still extant and no useful purpose would be served by a second order. See *Canton Sign Co.*, 186 NLRB 237 (1970). However, where as here the allegations involve unilateral changes which would support remedies that were not included in the prior proceeding, the Board has issued a second bargaining order. See, e.g., *Chicago Educational Television Assn.*, 308 NLRB 103 fn. 1 (1992); and *Eagle Material Handling, Inc.*, 227 NLRB 174, 178 fn. 18 (1976). Accordingly, consistent with this precedent, we shall issue such an order here.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Sheet Metal Workers International Association, AFL–CIO, CLC, Local Union No. 68 as the exclusive representative of the employees in the following appropriate bargaining unit, by unilaterally changing the wages of unit employees and unilaterally commencing the use of employees from a temporary service to perform bargaining unit work without providing the Union prior notice or an opportunity to bargain over the changes and their effects:

INCLUDED: All production and maintenance employees located at our 3000 West Commerce Street, Dallas, Texas facility only.

EXCLUDED: All other employees, including office clerical employees, supervisors, including assistant supervisors, and guards as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the wages of the unit employees and the use of employees from a temporary service to perform unit work, and put in writing and sign any agreement reached.

WE WILL make the unit employees whole for any losses incurred as a result of our unlawful unilateral changes, with interest.

CLARK UNITED CORPORATION

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